

What has Happened with Directive 2014/54 on Strengthening the Rights of EU Workers?

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Introduction

Free movement of workers has always been a core area of interest of Elspeth. As one of the leading members of the Network on Free Movement of Workers, which was coordinated by the Centre for Migration Law until 2014, she left a strong mark on the activities of the Network. One of the most influential activities of the Network was the preparation of two reports, which provided a basis for the Commission to come up with a proposal to strengthen the enforcement of the free movement of workers in April 2013.¹ This proposal was adopted at a—for EU standards—superfast pace, within a year. On 16 April 2014 Directive 2014/54, aimed at facilitating the uniform application and enforcement of the already existing rights conferred on workers by Article 45 TFEU and by Regulation 492/2011 in the context of freedom of movement for workers, was adopted.² The scope of this Directive is identical to that of Regulation 492/2011 and it applies to Union workers and members of their families.

The right of free movement of workers includes the right not to be discriminated against on grounds of nationality as regards access to employment, pay and other working conditions. Regulation 492/2011 details the rights derived from free movement of workers and defines specific areas where discrimination on grounds of nationality is prohibited, in particular as regards:

- access to employment
- working conditions
- access to social and tax advantages
- access to training
- membership of trade unions and eligibility for workers' representative bodies
- access to housing
- access to education apprenticeship and vocational training for the children of Union workers
- assistance given by employment offices.

Although all these rights are present, there is a difference between formal equality (equal rights before the law) and material equality (equal outcomes, results). From a sociology of law perspective this is described as a difference between *law in the books*

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1 Proposal for a Directive of the European parliament and of the Council on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, 26 April 2013, COM(2013)236.

2 OJ 2014 L 126/8.

and *law in action*. Directive 2014/54 aims to remove existing obstacles to the free movement of workers, such as the lack of awareness of EU rules among public and private employers and the difficulties faced by mobile citizens to get information and assistance in the host Member States. To overcome these barriers and prevent discrimination, the Directive requires Member States to:

- create national contact points providing information, assistance and advice so that EU migrant workers, and employers, are better informed about their rights
- provide appropriate means of redress at national level
- allow labour unions, NGOs and other organisations to launch administrative or judicial procedures on behalf of individual workers in cases of discrimination
- give better information for EU migrant workers and employers in general.

These measures should ensure a better application of EU law on persons right to work in another Member State and make it easier for workers to exercise their rights in practice. The Directive does not create any new rights for workers, but according to the Commission will help to ensure real and effective application of the existing legislation.

A crucial part of the Directive is dedicated to the obligation for Member States to ‘designate one or more structures or bodies (“bodies”) for the promotion, analysis, monitoring and support of equal treatment of Union workers and members of their family without discrimination on grounds of nationality, unjustified restrictions or obstacles to their right to free movement and shall make the necessary arrangements for the proper functioning of such bodies’.

Member States shall ensure that the competences of those bodies include: ‘(a) providing or ensuring the provision of independent legal and/or other assistance; (b) acting as a contact point *vis-à-vis* equivalent contact points in other Member States in order to cooperate and share relevant information; (c) conducting or commissioning independent surveys and analyses concerning unjustified restrictions and obstacles to the right to free movement, or discrimination on grounds of nationality; (d) ensuring the publication of independent reports and making recommendations on any issue relating to such restrictions and obstacles or discrimination; (e) publishing relevant information on the application at national level of Union rules on free movement of workers’ (article 4).

Those bodies may form part of existing bodies at national level which have similar objectives. In that case the Member State must ensure allocation of sufficient resources to the existing body for the performance of additional tasks (recital 18).

When bodies provide assistance in legal proceedings such assistance shall be free of charge to persons who lack sufficient resources in accordance with national law or practice.

What Are Still the Main Obstacles?

The following five issues can be distinguished as providing still the main obstacles to full free movement of workers:

- Tension free movement of workers law and national immigration law;
- Equality of treatment;
- Access to employment in the public service;

- Language requirements and recognition of diploma's and qualifications;
- Frontier workers.

Tension Free Movement of Workers Law and National Immigration Law

One of the obstacles in the application of the EU rules on free movement is the lack of separation between national immigration law and the implemented free movement rules. The privileged position of EU nationals is disregarded in practice because free movement rules are integrated in general immigration law and applied by immigration officers with these national immigration rules in mind. EU workers are required to prove sufficient income (which is not correct), they are required to present documents routinely asked from third-country nationals but not required under EU law, they have to wait for their cases to be dealt with because immigration authorities give preference to other (e.g. asylum) cases, and sometimes national rules on expulsion on public order grounds are applied rather than the more strict EU public order exception.

Equality of Treatment

As a result of the economic crisis and austerity measures, national authorities have become increasingly interested in limiting access to social assistance and other benefits, including stricter scrutiny to end residence for workers. Social benefits are subject to conditions more easily met by nationals than by EU citizens (e.g. a residence condition). The Netherlands for instance introduced a language requirement in 2016 as a condition to become eligible for a social assistance benefit. Although the new requirement in theory applies to "everyone", there is an exemption for recipients of social assistance who have had eight years of education in the Netherlands. This clause exempts practically all indigenous (=non-immigrant) Dutch nationals.³

Access to Employment in the Public Service

There are still problems for EU workers to access employment in the public service in many EU Member States both in law and practice.⁴ Article 45(4) TFEU allows for a restriction of access to certain posts in the public service to its own nationals in accordance with Article 45(4) TFEU, but the Court of Justice of the European Union (CJEU) has consistently held that this exception is to be interpreted restrictively and covers only posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities.

3 C.A. Groenendijk & P.E. Minderhoud, 'Taaleis in de bijstand. Discriminerend, disproportioneel en onnodig', 91(3) *Nederlands Juristenblad* 2016, p. 183-189.

4 P.E. Minderhoud & B. Friðriksdóttir, *Report on Posts in the Public Sector Reserved for Nationals Developments in the 27 Member States in 2009-2012* (external report), Nijmegen: Centre for Migration Law 2013.

Language Requirements and Recognition of Diplomas and Qualifications

There are continuing restrictions in some Member States regarding access to posts in several sectors (for instance academic and maritime sector) caused by strict language requirements. Another problem is that professional qualifications and experience acquired in other Member States are not taken into account or are taken into account in a different way.⁵

Frontier Workers

Special problems can still be recognised for frontier workers, who live in one Member State and work in another.⁶ They often encounter difficulties with access to social entitlements and labour market support and tax issues, caused by provisions which use a direct or indirect residence requirement as a condition for eligibility. Other reported obstacles are linguistic differences, lack of information and knowledge pertaining to the legal status of frontier workers and the implications thereof, lack of mutual recognition of professional and academic qualifications and lack of cooperation between competent authorities and administrations in the various Member States.⁷

What Impact and Added Values can be Expected from the Directive?

The Directive underlines the importance of free movement of workers, even in times when this is under pressure, and faces the reality that there are still problems to tackle, despite the fact that formally equal treatment is the norm.

But in my view there are three main factors which can influence the effectiveness of the Directive in a negative way from the start.

The first problem is that the Directive, which is modeled after other Equality Directives, suffers from the same weaknesses as these other Equality Directives, and moreover lacks some of the enforcement tools of these Equality Directives.

Secondly, the success of the directive depends highly on the willingness of Member States to take this Directive seriously.

Thirdly, it is not applicable to posted workers, while this is an area where some of the most structural problems regarding discrimination on nationality occur.

5 U. Iben Jensen, *Analytical Note for 2013. The Language Requirements under EU Law on Free Movement of Workers*, February 2014, Brussels: European Network on Free Movement of Workers within the European Union 2014. Available at <https://www.ru.nl/law/cmr/research/projects/fmow-1/thematic-analytical/>.

6 Frontier workers are defined as EU citizens who work in one Member State, yet reside in another, and who return to the Member State of residence on a daily or weekly basis (Article 1(f) Reg. 883/2004).

7 Y. Jorens, P. Minderhoud & J. De Coninck, *Comparative Report: Frontier workers in the EU*, FreSsco, Brussels: European Commission, January 2015.

Same Weaknesses as Other Equality Directives

The structure and text of the provisions of Directive 2014/54 are highly similar to that of for example the Race Directive 2000/43 which implements the principle of equal treatment between persons irrespective of racial or ethnic origin.⁸ An important difference is that neither the Race Directive, nor any of the other equal treatment directives cover the ground of nationality, and the Race Directive stipulates specifically states in its Recital 13 and Article 3(2) that ‘This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality...’

The text of Article 3 on Defence of rights is highly similar to the text of Article 7 of the Race Directive on Defence of Rights. The same applies to Article 5 on Dialogue which corresponds partly with Article 11 Race Directive on Social Dialogue and Article 12 Race Directive on dialogue with non-governmental organizations. Article 7 on Minimum requirements corresponds with article 6 Race Directive (Minimum requirements).

Article 6 on Access to and dissemination of information corresponds with Article 10 Race Directive (Dissemination of information), but here an extra provision can be found in Article 6(2) of Directive 2014/54, which says that:

‘Member States shall provide, in more than one official language of the institutions of the Union, information on the rights conferred by Union law concerning the free movement of workers that is clear, free of charge, easily accessible, comprehensive and up-to-date. This information should also be easily accessible through Your Europe and EURES.’

Reports monitoring the implementation of the Race Directive underline that the main challenge identified in many Member States is the lack of enforcement of anti-discrimination laws in practice, particular with regard to access to justice.⁹ There is still a problem of lengthy procedures, evidence, high costs, failures in the provision of legal aid, ineffective sanctions, barriers in the form of language, issues relating to legal standing and legitimate interest.¹⁰ For effective claiming it is necessary to have adequate access to justice, which is not always available. In this context we can refer to the so-called naming, blaming, claiming problem.¹¹ EU workers first have to become conscious of the fact that they are discriminated and to define the acts as such (naming). Therefore they need knowledge of the equal treatment rules but also of the facts, the context and the ability to compare their situation with the situation of others. As a second step they have to hold someone responsible for the act of discrimination (blaming) and thirdly,

8 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin Official Journal L 180, 19/07/2000 P. 0022-0026.

9 Report of the European Commission on the application of 2000/43 and 2000/78, 17 January 2014, COM(2014)2, p. 16.

10 Equinet, *Equality law in practice; report on the implementation of the race and general framework directives*, Brussels: Equinet 2013.

11 W.F.L. Felstiner, R.L. Abel & A. Sarat, ‘The emergence and transformation of disputes: naming, blaming, claiming’, *Law & Society Review* 1981, p. 613-654.

they have to start a legal procedure, which could be difficult because of fear for retaliation or worsening of the relation (claiming).

Therefore Directive 2014/54 shows characteristics of a so called ‘symbol-act’ which suffers from a serious lack of effectiveness in advance.¹² On the one hand this legislation seeks to strengthen the rights of workers, but on the other hand it does not provide the proper tools for enforcement of the objectives the Directive wants to achieve.

Willingness of Member States to Take this Directive Seriously

The Directive had to be implemented in national legislation by 21 May 2016. Some Member States, such as the UK and the Netherlands, have indicated from the beginning that they did not have to take many measures because all the rights of EU workers are already secured. The British government stated: ‘These rights are already enforceable in the UK before the national courts and the Government considers the likely impacts of the Directive to be minor in practice’. According to the Government the Directive will not significantly affect the balance of competence.¹³

The Dutch Minister of Social Affairs said in Parliament that the Directive would not lead to much legal changes. According to the Minister and the Parliament the Netherlands is already doing a good job and the Directive will not add much.¹⁴ He emphasized that the scope of the Directive is limited to the scope of Regulation 492/2011. Some members of parliament even questioned the necessity of the Directive in the light of the own responsibility that EU migrant workers have themselves.¹⁵

In order to fulfil the obligation to implement the Directive the Dutch government only issued one ministerial decree in which a part of the ministry of Social Affairs is designated with the competence to coordinate activities of already existing bodies which deal with equal treatment of Union workers, like the Dutch legal advice centres, the ombudsman, local anti-discrimination organisations and the Netherlands Institute for Human Rights (the Dutch Equality Body).¹⁶

According to the Dutch government the extra provision of Article 6(2) on access to and dissemination of information does not need special implementation because there is already sufficient information available on the website of the government through a special brochure: *Nieuw in Nederland* (New in the Netherlands).¹⁷ This brochure of 20 pages provides information on the rights of workers (like labour conditions and working hours rules), but also on membership of a trade union, education, learning the Dutch language and on the possibilities of housing. This brochure has been translated in most EU languages. EU migrant workers get it when they register as a resident with the municipality in the Netherlands, which is obligatory.

12 V. Aubert, ‘Some Social Functions of Legislation’, 10(1/2) *Acta Sociologica – Contributions to the Sociology of Law* 1966, p. 98-120.

13 <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2015/ofmdfm/13515.pdf>.

14 *Kamerstukken II* 2012–2013, 33 635, nr. 4, p. 8-9.

15 *Kamerstukken II* 2012–2013, 33 635, nr. 4, p. 4.

16 Wijziging OMV-besluit i.v.m. implementatie richtlijn 2014/54 vergemakkelijken uitoefening vrij verkeer van werknemers, *Official publication: Staatscourant (Journal Officiel néerlandais)*; Number: 23600; Publication date: 10/05/2016; Page number: 00001-00006.

17 See www.newinthenetherlands.nl.

It can be questioned whether this minimalist approach will be seen as a sufficient way of implementation of the Directive. For instance it is not clear which body in the Netherlands is competent to deal with the issue of nationality discrimination regarding social and tax advantages.

Other Member States have taken a different position in respect of implementation. For example, Lithuania wants to use the Directive to strengthen the rights of their own Lithuanian workers in other Member States. Given the fact that Lithuania is more a sending country of workers than a receiving one this is an understandable desire. Regarding their own legislation, Lithuania has the problem that much legislation contains a permanent residence requirement which is a condition for accessing most of the social benefits. This requirement discriminates EU workers of other Member States from own nationals and has to be adapted.¹⁸ The fact that Lithuania has changed 66 different Acts in the implementation process of this Directive raises the presumption that they have dealt with this adaptation of the residence requirement in a structural way.¹⁹

Not Applicable to Posted Workers

The new Directive will only apply to situations which fall under the scope of Article 45 TFEU and Regulation 492/2011. At the moment for instance in the Netherlands the more structural problems occur with Polish and Portuguese workers, who work as posted workers and fall under the scope of article 56 TFEU (freedom of services) and Directive 96/71, concerning the posting of workers (in the framework of the provision of services), which gives these workers a much lower set of rights than article 45 TFEU and Directive 492/2011 does.

A worker is 'a posted worker' when he is employed in one EU Member State but sent by his employer on a temporary basis to carry out his work in another Member State. There is an employment relation between the undertaking making the posting and the worker during the period of the posting. The core of mandatory rules on posting covers issues such as payment of minimum wages, maximum work periods and minimum rest periods, minimum paid annual leave, equal treatment between men and women and issues such as health and safety at work and includes protective measures in the terms and conditions of employment of pregnant women, of children and of young people. These workers are cheaper because they do not have to be paid the higher wages based on collective labour agreements and they fall under the lower social security and pensions systems of their country of origin, like Portugal or Poland. The issue of posting of workers seems to create more structural difficulties at this moment than the issue of free movement of workers. Posting has become one of the channels for cross-border recruitment of 'cheap' labour without reference to the rights that can be derived from EU law on genuine labour mobility.²⁰ Main problems are the evasion of minimum wages, abuse of payment of social security contributions and an evasion of collective agreements.

18 See presentations FreSso seminar Latvia-Lithuania, Riga, 16 September 2015, <http://ec.europa.eu/social/main.jsp?langId=nl&catId=88&eventsId=1042&furtherEvents=yes>.

19 <http://eur-lex.europa.eu/legal-content/en/NIM/?uri=celex:32014L0054>.

20 J. Cremers, 'Economic freedoms and labour standards in the European Union', *Transfer* 2016, p. 149-162.

Interference of Other Developments

After the adoption of Directive 2014/54 the attention of the Commission and other (European) institutions shifted rapidly towards the introduction of other instruments or measures strengthening the position of EU workers in one way or another. The Juncker Commission which took office in November 2014 formulated other priorities. Most important in this regard are the introduction of the Social Pillar, the revision of the Posting of Workers Directive and the introduction of the European Labour Authority (ELA).

The Introduction of the Social Pillar

On 17 November 2017, the European Parliament, the Council and the Commission jointly proclaimed at the Social Summit in Gothenburg the European Pillar of Social Rights. The Pillar sets out a number of key principles and rights to support fair and well-functioning labour markets and welfare systems.²¹ It is designed as a compass for a renewed process of convergence towards better working and living conditions across the Union, ensuring the citizens equal opportunities and access to the labour market, fair working conditions and social protection and inclusion. Ensuring fair labour mobility in Europe is central to this objective.²² This Social Pillar was developed at the initiative of Commission President Juncker and promoted as the most comprehensive effort to advance the social dimension of European integration. The problem in the context of Directive 2014/54 is that the Social Pillar addresses the position of own national workers in general and not specific to the position of mobile EU workers.

The Revision of the Posting of Workers Directive

Posting of workers plays an important role in the internal market, particularly in the cross-border provision of services. The Posting of Workers Directive (Directive 96/71/EC) and the Enforcement Directive on Posted Workers (Directive 2014/67/EU) aim to ensure a correct balance between the freedom to provide cross-border services and the social rights of workers. While the number of posted workers continues to increase significantly, problems such as unfair practices and unequal remuneration persist.

Therefore a significant revision of the Posting of Workers Directives was proposed and adopted in July 2018. The amendments to the Posting of Workers Directive (Directive 2018/957) bring changes in three main areas: the remuneration of posted workers (making it equal to that of local workers, even when subcontracting), more coherent rules on temporary agency workers, as well as long-term posting.²³ Long-term posting (with labour law provisions of the host country to be applied) starts after 12 months (with a possible extension of six months). The overall amount of remuneration received by a posted worker must meet the level of remuneration in the host Member

21 See Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights, COM (2017) 251.

22 An overview of the European Pillar of Social Rights is available here: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en.

23 OJ 2018 L173/16.

State (without the reimbursement of the worker's expenses) which must be published on a single national website. Host Member States can accord to posted workers the coverage of representative collective agreements in all sectors, and they must protect them against fraudulent posting. These amendments have to be implemented by the Member States before 30 July 2020. This revision of the Posting of Workers Directive introduces stricter requirements to all service providers active in transnational business, with the intent to 'create a social Europe that protects workers and stops companies from engaging in a race to the bottom', but the question remains whether this revision will be able to ensure the compromise between fair competition and the right of workers, or will it just burden transnational businesses and limit the cross-border provision of services altogether?²⁴

The Introduction of the European Labour Authority

In March 2018 the Commission launched the initiative to establish an European Labour Authority.²⁵ The establishing of this Authority was approved by the European Parliament in April 2019 just before its mandate expired and was adopted by the Council on 13 June.²⁶ The European Labour Authority's objective is to help strengthen fairness and trust in the Single Market. To that effect the Authority should support the Member States and the Commission in strengthening access to information about rights and obligations in cross-border labour mobility situations and in facilitating the solution of cross-border labour market disputes or irregularities. The tasks of the Authority include:

- Facilitate access to information by individuals and employers on rights and obligations and to relevant services in cross-border labour mobility situations;
- Facilitate cooperation and exchange of information between national authorities;
- Coordinate and support concerted and joint inspections by national authorities;
- Carry out analyses and risk assessments on issues of cross-border labour mobility;
- Support capacity building national authorities through guidance, mutual learning and training;
- Mediate in disputes between Member States on the application of EU law concerning labour mobility
- Facilitate cooperation between relevant stakeholders for cross-border labour market disruptions, e.g. large scale restructuring.

The activities of the ELA will be mainly aimed at cross-border labour mobility issues at a supra national level. It will probably have more impact on the situation of posted workers than mobile workers because posted workers' employment regulation falls under multiple jurisdictions, while mobile workers' rights tends to assume a single national

24 www.fragomen.com/insights/blog/revision-eus-posting-workers-directive-blessing-or-curse-business..

25 Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority. COM (2018) 131.

26 <https://www.consilium.europa.eu/en/press/press-releases/2019/06/13/european-labour-authority-council-adopts-founding-regulation/>.

jurisdiction. The new Regulation also limits the possibility that the ELA launches common enforcement actions in the Member States. According to Cremers the ELA's competence to strengthen the legal capacity of the national enforcement bodies in joint and EU-wide investigations in cases of infringements or irregularities related to cross-border labour mobility needs to be reinforced.²⁷ The current proposal lacks teeth in his view.

Commission's Report on the Implementation of Directive 2014/54

In December 2018 the Commission published a very modest and low profile report of 10 pages on the implementation of the Directive in the Member States, fulfilling its reporting obligation under Article 9 of the Directive.²⁸ An important conclusion is that a number of the provisions of the Directive had already been complied with through national instruments that already existed when the Directive entered into force. Legislative amendments in many countries have been limited to transposing Article 4 on the designation of the body to promote equal treatment. A study by Jakuleviciene showed that the discretion left to the Member States in choosing these bodies responsible for the promotion, analysis, monitoring and support of equal treatment led to a situation in which only in two Member States (Germany and Ireland) a new institution has been established, while in the other Member States either the extension of the mandate of one existing body has taken place or several existing bodies together fulfill this task under the coordination of one of them (like in the Netherlands).²⁹ According to the Commission it remains to be seen whether these bodies cover the issue of prohibiting unjustified restriction on or obstacles to free movement in practice. Moreover, it seems no additional resources have been allocated to the existing bodies to deal with their new competences. Robust conclusions on its impact cannot be drawn at this stage but information mainly provided by the Member States should suggest that the Directive has had a positive impact for all stakeholders. According to the Commission it is difficult, if possible at all, to assess to what extent the implementation of the Directive has helped raise Union citizens' awareness of their rights regarding free movement. This is an interesting observation because this awareness raising is one of the core goals of the Directive. In short a lot remains to be done in practice to ensure the Directive's aims will be attained.

27 J. Cremers, 'A Single market for many Labour Markets', 9 *The Progressive Post* 2018, p. 64-65.

28 COM(2018)789. See article 9 Directive 2014/54: By 21 November 2018, the Commission shall submit a report to the European Parliament, to the Council and to the European Economic and Social Committee on the implementation of this Directive, with a view to proposing, where appropriate, the necessary amendments.

29 See L. Jakuleviciene et al., 'Institutional Models under Directive 2014/54: Advantages and Disadvantages for Free Movement of Workers and their Family Members', *European Journal of Migration and Law* 2018, p. 223-251.

Conclusion

Free movement of workers is one of the four classic freedoms on which the European Union is based. Member States have an obligation to protect this freedom to the best of their abilities. Directive 2014/54 was adopted to break through the symbolic character of the equality of rights of workers, but more has to be done to ensure that it does not become a symbolic-act itself. New initiatives like the Social Pillar and the establishment of the European Labour Authority can not only impede the effectiveness of the instruments of Directive 2014/54 but stimulate it as well. Although the start has been rather disappointing there are still chances to make a success out of Directive 2014/54. There is a challenge for governments, trade unions and NGO's to make more use of the possibilities of the Directive, a challenge for Equality Bodies to play a more (pro-)active role and a challenge for the Commission to stimulate Member States to take the Directive seriously.